1-9-2013

Riley v. Spiral Butte Development, LLC Respondent's Brief Dckt. 40061

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

Supreme Court Case Number : 40061-2012

NORMAN AND ROBIN RILEY, husband and wife,

PLAINTIFFS-APPELLANTS

vs.

SPIRAL BUTTE DEVELOPMENT, LLC, an Oregon Limited Liability Company,

JIM HORKLEY, an individual, and

DOES I-V

DEFENDANTS-RESPONDENTS

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,

in and for Madison County

Hon. Darren B. Simpson, District Judge

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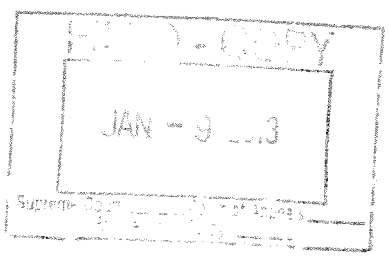

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STATEMENT OF THE CASE

This matter involves a property dispute concerning real property in Madison County Idaho. R. p. 167. On October 25, 2002, the Plaintiffs, Rileys entered into a Lease Option Agreement with Spiral Butte Development LLC. R. p. 15. The Lease Option Agreement required Rileys to use the real property exclusively as farm property, to pay rent in advance in the sum of $102,500 per year payable on the 20th day of June and 20th day of December of each year. R. pp.115-16. Rileys were to regularly occupy and use the property, and not vacating the property for more than 10 days. R. p. 16. The Lease Option Agreement contained additional mandatory terms including but not limited to paying for utilities, including electricity, water, and all payments on any equipment which was on the premises. R. pp. 16-19. Rileys were required to maintain a liability, fire and casualty insurance policy on the premises. R. p. 17. Additionally Rileys were to pay all expenses of maintenance, operation and repair of the premises and equipment thereon. R. p. 17. Rileys were required to pay all real property taxes, water assessments and personal property taxes for personal property on the premises. R. p. 16. The Lease Agreement further required Rileys to keep the leased premises including fixture, equipment, machinery, exterior and interior walls, doors, heating, ventilating and cooling systems, wiring, plumbing, drain pipes, sewer or septic tanks, roofs gutters, down spouts and foundation in good repair at their own costs and expense. R. pp. 16-17.

Importantly, Rileys were specifically prohibited from assigning any interest in the Lease Agreement without the prior **written** consent of the Lessor. R. p. 17. Section 21 of the Lease Agreement contains a provision that the Lessor may terminate the lease without demand or notice and enter upon the premises and evict the lessee if the Lessee shall be in arrears in the payment of said rent for a period of 15 days after the same becomes due. R. p. 20.

The option provisions beginning in Section 29 of the Lease Option specifically states that a condition of the exercise of a valid option requires the "Lease be in full force and effect, and that the Lessee's shall not be in default thereunder." R. p. 22.

If the Lessees were in full compliance of the terms of the Lease Agreement, they were permitted to exercise the option on or before December 20th, 2007. R. p. 22. Section C specifies the exercise of the purchase option required full payment of the balance due at closing, which closing Lessee was required to designate, and to occur not later than January 30, 2008, at Alliance Title and Escrow Rexburg Idaho. R. p. 23.

Section 30 of the Lease Option Agreement specifically states that this is the entire agreement and that it cannot be modified or amended in whole or in part except and by a writing executed by both parties hereto. R. p. 24.

The Rileys never took possession of the property, never paid any rent, did not pay for any of the utilities, paid no taxes, made no repairs, and never tendered full payment for the option to purchase.

On December 11, 2007, Rileys sent a letter to Jim Horkley (Horkley) expressing the intent to exercise the purchase option of the Lease Option Agreement. R. pp. 27-28. Horkley responded by letter informing the Rileys that they would be unable to exercise the purchase option as they were in default of the Lease Option Agreement on December 21, 2007. R. pp. 141-142.

Rileys did not cure any defaults alleged in the December 21, 2007 letter, but filed a Complaint on February 20, 2008. Horkley and Spiral Butte Development answered the Complaint and later, on February 17, 2012 moved for summary judgment. The District Court

granted Summary Judgment against the Rileys on April 23, 2012. Rileys then filed this appeal of the District Court's Order on Summary Judgment.

STANDARD OF REVIEW

When reviewing an order for summary judgment, the standard of review for this Court is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate if 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' I.R.C.P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Electric*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). "However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012). "This Court exercises free review over questions of law." *Fuller*, 150 Idaho at 851, 252 P.3d at 1269.

"A nonmoving party is not invariably entitled to the drawing of favorable inferences. Where, as here, no jury trial has been requested and the judge ultimately would be the trier of fact, the judge may draw those inferences which he deems to be best supported by the uncontroverted facts." *See Riverside Development Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992). The burden may

be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct.App.2000).

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

"The interpretation of a contract begins with the language of the contract itself." *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004).

ISSUES PRESENTED ON APPEAL

1. Were there any material issues of fact relating to the Rileys' breach of the Lease Option Agreement.

2. If there was a separate oral lease, did the District Court correctly that it was barred by the Statute of Frauds.

3. Did the District Court correctly conclude that the lease to Jensens was an oral lease between Horkley and Jensens, unrelated to the Lease Option Agreement between Spiral Butte and the Rileys.

4. Were the Rileys in substantial default of numerous provisions of the Lease Option Agreement and did the Rileys fail to tender payment on or before the closing date.

5. Attorney Fees on Appeal

ARGUMENT

1. WERE THERE ANY MATERIAL ISSUES OF FACT RELATING TO THE RILEYS' BREACH OF THE LEASE OPTION AGREEMENT

In the District Court, Defendants sought and were granted summary judgment based on the breach of the Lease Option Agreement by the Plaintiffs. The breach of the Lease Option Agreement was not limited to the single issue of rent payments, as the Rileys suggest, but the agreement was breached on numerous grounds contained in sections 1, 3-7, 11 and 13 of the lease Option Agreement. The breach of each of these sections of the Lease Option Agreement are discussed in section four of this brief.

On appeal, the Rileys argue that a material issue of fact was raised as to their breach of the Lease Option Agreement and summary judgment was therefore granted in error. To support this position, the Rileys argue that a material issue was raised with regard to the payments owed pursuant to the Lease Option Agreement. The Rileys' argument on appeal fails to acknowledge or address any additional defaults Defendants presented for the District Court's consideration on summary judgment.

To avoid summary judgment, Rileys claim that the material issue of fact that they raised was the Jensens taking over the farming operations of the property and paying the required rent. No other breached sections of the Lease Option Agreement are addressed.

Section 29 of the Lease Option Agreement, which provides for the option to purchase, requires that at the time of exercising the option, the Rileys cannot be in default under the agreement. This would include a default under any singular section of the agreement. Raising an issue of material fact on only some of the allegedly breached sections is insufficient to avoid

summary judgment. If there is no material fact as to a breach of any one section, summary judgment is appropriate.

Despite the foregoing argument, the Rileys did not show an issue of material fact as to the payments of the rent under the Lease Option Agreement. There is no dispute between the parties that the required $102,500.00 per year was never paid by the Rileys or anyone else.

The arguments presented by the Rileys in their brief attempt to show an agreement made with the Jensens to take over the farming operations of the property. There is nothing in the arguments or record to show any specifics concerning this agreement or that the agreement with the Jensens was a full and complete assignment of the Lease Option Agreement from the Rileys to the Jensens. In an attempt to support their position, the Rileys make a general reference to three sections of deposition testimony, discussed below.

The deposition section of Norman Riley referenced by the Rileys on page 4 of their brief does not support the position that the Jensens were going to pay the required rent. In fact, this deposition testimony only shows Norman Riley's attempt to re-lease the property back to Jim Horkley. The only lines containing any reference to the Jensens farming the property are as follows:

> A. Jim (Horkley) came to me, said he wanted to rent the property. I said "Fine. You can rent the property."
> Q. Okay.
> A. He said "I want Lawrence Jensen to run it for me."
> Q. Okay.
> A. He wanted him to farm it. And I says "Jim, you can do whatever you want on the property, just make sure the payments are going to be paid. Is that right?"
> Q. All right.
> A. And he says "Yes" –
> Q. Okay.
> A. – "I'll do that."

> Q. Do you have anything in written – any written lease agreement or written document containing the terms of a lease agreement between you and Jim Horkley?
> A. No.
> R. p. 169.

Mr. Riley does not state any specific lease agreement terms, payments to be made, or how the Jensens are going to be responsible for the additional terms and requirements in the Lease Option Agreement. These statements by Norman Riley do not create a genuine issue of material fact as to the payment of the rent on the Lease Option Agreement. Additionally, the statements do not create a genuine issue of fact as to the remaining requirements under the Lease Option Agreement the Rileys were obligated to perform.

The second section of deposition testimony referenced by the Rileys in their brief to support the allegation of an agreement to lease the property to the Jensens is the deposition of Jim Horkley. There is nothing contained in this section that creates a genuine issue of material fact to the payment of the rent owed under the Lease Option Agreement or the fulfillment of the additional requirements by the Jensens.

In the deposition, Mr. Horkley states that the only agreement he recalled was for the Jensens to farm the property and pay a rent that was less than the amount the Rileys were to pay, and that the Rileys would make up the difference each year, an amount of approximately $20,000.00. R. p. 184. Horkley additionally states that the Rileys never paid the difference in the rent amounts. *Id.* The Rileys were also asked to pay for additional items pursuant to the Lease Option Agreement including payment on irrigation circles and water. *Id.*

This section again provides no evidence of any specific agreement for the lease by the Jensens. There is nothing in this section that would show that the Jensens were going to assume all of the responsibilities under the Lease Option Agreement for the Rileys. In fact, this section

shows where Horkley went to the Rileys to require them to perform the other requirements of the Lease Option Agreement and the additional breaches of the Lease Option Agreement such as rent and maintenance of fixtures. .

The final section of deposition testimony referenced by the Rileys in their brief on page 4 to support the allegation of an agreement to lease the property to the Jensens is found in the record on page 189, the deposition of Mark Jensen.

Mr. Jensen states that he was initially contacted by Horkley to farm the property. R. p. 189. Mr. Jensen does state that Mr. Riley was present for one meeting between himself and Horkley in Horkley's office. *Id.* Mr. Jensen was asked, "When you met in [Horkley's] office, did you actually reach an agreement at that time that you remember?" to which Mr. Jensen responded, "I don't remember." *Id.* Mr. Jensen was asked if he had any additional conversations with Mr. Riley about renting the property before he started running it, to which Mr. Jensen answered, "I don't remember having any." *Id.* Mr. Jensen would further state that he made payments to Horkley as directed by Horkley for the property. *Id.*

In referencing this section, the Rileys again show no evidence of any agreement for the Jensens to lease the property, pay the entire rent or perform all of the requirements in the Lease Option Agreement for them. There is nothing in the record to indicate that the Rileys were present on the property, participated in any way, or were involved in the lease agreement between Horkley and the Jensens.

The Rileys' argument that the lease to the Jensens was an extension or assignment of the Lease Option Agreement fails. The Rileys did not provide any evidence of an agreement with the Jensens where the Jensens would assume each and every obligation of the Lease Option Agreement.

The Motion for Summary Judgment by the Defendants was sought on all of the issues from the Lease Option Agreement not fulfilled by the Rileys, not only the singular issue of payment of the rent. The Motion for Summary Judgment additionally included the additional breaches of:

1. Maintenance of the equipment,
2. Payment of all taxes,
3. Payments on all equipment
4. Water assessments
5. Payment of utilities,
6. Maintaining insurance and
7. Use of the property.

The Rileys do not now, nor did they in the District Court contend that Jensens paid the taxes, water assessments, provided insurance, maintained the equipment, or fulfilled a single obligation of Rileys specified above. Rileys' only contention is that Jensens paid rent to Spiral Butte each year. No claim is made by the Rileys that they paid or attempted to pay the difference between Jensen's rent and their rental obligation of $102,500.00. The Rileys do not claim that the entire $102,500.00 was ever paid each year to Spiral Butte.

The District Court's decision was based on each of these terms required by the Lease Option Agreement. A failure of the Rileys to meet any single requirement of these terms would be a breach of the agreement and render the Rileys barred from exercising the purchase option. Rileys failed to satisfy a single one of them.

As the clear facts presented to the District Court show, the Rileys did not meet any of the obligations in the Lease Agreement, and by, its specific terms, the Rileys could not have exercised the option. The attempt to show that a material issue of fact existed in the form of the lease with the Jensens is insufficient to avoid summary judgment.

2. IF THERE WAS A SEPARATE ORAL LEASE, DID THE DISTRICT COURT CORRECTLY THAT IT WAS BARRED BY THE STATUTE OF FRAUDS

The Rileys next argue that the District Court erred in its findings on the oral lease agreement with the Jensens. Specifically, the Rileys state that the oral lease agreement with the Jensens does not violate the Statute of Frauds. The Rileys argue this lease agreement with the Jensens was either a separate agreement or a modification of the written lease agreement.

The arguments and conclusions sought in this section by the Rileys are immaterial to the ultimate question of the breach of the Lease Option Agreement by the Rileys. The existence of a valid lease agreement with the Jensens would not create a genuine issue of material fact to survive summary judgment, regardless if this agreement a separate agreement or modification.

As noted above, the Rileys do not now, and did not in the District Court argue that the Jensens were taking responsibility for all of the Rileys obligations under the Lease Option Agreement. As such, the District Court's finding that the agreement with the Jensens to farm the property and pay a rent violated the Statute of Frauds does not influence the determination on summary judgment.

The Rileys rely upon I.C. §9-504 and the case of *Jolley v. Clay*, 103 Idaho 171, for the position that the Statute of Frauds does not preclude oral agreements where there has been partial performance. As was noted by the district Court, this action by the Rileys was not to enforce an oral lease agreement with the Jensens. The Rileys seek to enforce the Lease Option Agreement they entered into with Horkley. As such, the agreement with the Jensens, and any partial performance thereof, has no relevance to the matter at hand.

The purpose of I.C.§ 9-504 is to allow the courts the ability to enforce oral purchase agreements where there has already been a partial performance of that purchase. In the *Jolley*

case, the court allowed an oral agreement for the purchase of 20 acres to stand where the purchaser had been in possession of the property for 15 years, had paid more than half of the purchase price, had made improvements to the real property in the amount of $10,000.00 and there were two additional witnesses as to the seller's agreement to sell the property. In *Jolly*, the appellant occupied the land and performed functions which can only be attributable to an oral purchase agreement. The *Jolly* facts are completely opposite of the facts in this case.

Part performance is an equitable issue, i.e. that it would be inequitable for the seller to permit the buyer/occupant to occupy the property, pay for it, accept payments, improve it, and then say there was no agreement. Rileys did none of these things. They did not occupy the property, nor did they perform a single function which could be attributable exclusively to an oral agreement. The Rileys did not provide payment for any part of the Lease Option Agreement. From an equitable standpoint, the Rileys did nothing and are therefore out nothing.

There is no part performance by the Rileys to attempt to enforce. "Part performance takes a contract out of the statute of frauds only if the claimant's performance is attributable solely to the existence of the alleged oral agreement." *Simons v. Simons*, 134 Idaho 824, 827, 11 P.3d 20, 23 (2000); *Wolske Bros., Inc. v. Hudspeth Sawmill Co.*,116 Idaho 714, 715-16, 779 P.2d 28, 29-30 (Ct.App.1989).

The Lease Option Agreement the Rileys attempt to enforce is a written agreement. As such, it is not subject to part performance. Obviously once Rileys failed to take possession, and failed to satisfy a single term of the lease/option agreement, the subsequent lease of the farm to a third party, for a different lease amount, with different terms, the performance of the subsequent lease by a third party is not attributable solely to the written agreement between Riley and

Horkley. Jensens were never obligated to perform any of the terms identified in the Lease Option Agreement for the Rileys.

The Rileys also argue that the oral lease agreement to be pulled from the Statute of Frauds was a modification to the written Lease Option Agreement. Any modification of the Lease Option Agreement was required to be in writing, pursuant to the agreement itself. The Rileys have not shown any writing to modify the Lease Option Agreement. All oral modifications would be prohibited by this section of the Lease Option Agreement and the Parole Evidence Rule. Each and every provision of the Lease Option Agreement is complete and unambiguous. Reliance on any source other than the document is prohibited.

Again, "Part performance takes a contract out of the statute of frauds only if the claimant's performance is attributable solely to the existence of the alleged oral agreement." *Simons v. Simons*,134 Idaho 824, 827, 11 P.3d 20, 23 (2000); *Wolske Bros., Inc. v. Hudspeth Sawmill Co.*,116 Idaho 714, 715-16, 779 P.2d 28, 29-30 (Ct.App.1989). Part performance is not a modification of a written document, but only to show the existence of an oral agreement.

3. DID THE DISTRICT COURT CORRECTLY CONCLUDE THAT THE LEASE TO JENSENS WAS AN ORAL LEASE BETWEEN HORKLEY AND JENSENS, UNRELATED TO THE LEASE OPTION AGREEMENT BETWEEN SPIRAL BUTTE AND THE RILEYS

After reviewing the evidence, the District Court concluded that the lease to Jensens was a lease only between Horkley and Jensen, and that it was unrelated to the written lease between Spiral Butte and Rileys. The Rileys argue that it was between themselves and Jensens, and in essence, an assignment of the lease from Rileys to Jensens.

This argument fails on many levels. First, the testimony of Mr. Riley confirms that Horkley informed the Rileys that Horkley intended to rent the property to Jensens. It is clear that the Lease Option Agreement between Spiral Butte and the Rileys contained entirely different terms than the Horkley/Jensen agreement. The rent price was for a different amount and the agreements contained different terms and conditions. In Mr. Riley's deposition testimony on page 169, Mr. Riley was asked if he entered into a lease agreement with a third party, to which he answered, "Yes, Jim Horkley." Mr. Riley then clarified, stating, "Jim (Horkley) came to me and said he wanted to rent the property. I said, "Fine. You can rent the property."

Aside from the admission of Mr. Riley, and the facts concerning the lease terms, this argument fails additionally due to the Statute of Frauds (unenforceable if not in writing), the Parole Evidence Rule (contradicts the terms of the written contract). The Rileys do not maintain nor have they presented any evidence that they were not in default of the lease terms when they sent notification of their intent to exercise the option.

Lastly, it is unrefuted that the Rileys did not tender the purchase price on or before the designated closing date. The closing date per the letter of intent to exercise the option January 30, 2008. In his deposition, Mr. Riley admitted that he did not have the funds available to close and never tendered any funds.

This argument is irrelevant to the Courts decision on Horkley's motion for summary judgment. Had the court concluded that the lease to Jensens was between the Rileys and Jensens, the Rileys remained in default under the Spiral Butte/Riley lease, since Jensens paid annual rent in a sum of approximately $20,000 less than the Rileys owed Spiral Butte. Further, Jensens were not responsible for the real property taxes, payments on the equipment, maintenance, water assessments, utilities, or insurance.

In summary, the contract between Spiral Butte and the Rileys prohibited subleasing or assigning without written consent of Horkley. Further, it is undisputed that:

A. The Rileys were in substantial default at the time they attempted to exercise the option.(see section 4 hereafter for a full description)

B. That the lease option terms mandated that the Rileys not be in default in order to exercise the option.

C. The Rileys did not tender the amount due on or before the closing date.

D. The Lease Option Agreement could not be modified except in writing.

E. The Lease Option Agreement prohibited assignment by the Rileys without written consent of Horkley.

F. The lease with Jensens was entered into between Horkley and Jensen obviously due to the failure of the Rileys to abide by a single term of the lease. The Rileys did not take possession, which required Horkley find someone else to farm the land.

4. WERE THE RILEYS IN SUBSTANTIAL DEFAULT OF NUMEROUS PROVISIONS OF THE LEASE OPTION AGREEMENT AND DID THE RILEYS FAIL TO TENDER PAYMENT ON OR BEFORE THE CLOSING DATE

The Rileys were in default of numerous provisions of the Lease Option Agreement. The Rileys never entered the property or performed any requirement under the lease. In essence and fact, the Rileys only acknowledged the existence of the lease when they attempted to provide notice of exercising the option. The Rileys were in default of the following provisions by the admission of Mr. Riley in the deposition testimony noted:

1. Section 1 & 3: Pay rent of $102,500 paid in advance on June and December 20th. The Rileys did not pay any rent on the property. Not even the initial payment. R. p. 116.

2. Section 4: Additional rent in the form of electricity, water, equipment charges and insurance for the property. The Rileys did not pay any of these expenses and did not carry insurance as required. *Id.* at p. 113.

3. Section 5: All taxes associated with the property including the property taxes, improvement and equipment taxes or assessments and water assessments. The Rileys did not pay any of the taxes or assessments pursuant to section 5 of the agreement. *Id.* at p. 113. In fact, Mr. Riley testified that he had never paid any taxes on the property. *Id.*

4. Section 6: Not abandon or vacate the premises for more than 10 days without prior written approval of Lessor. The Rileys never obtained written permission to not be on the property. *Id.* at p. 114. They never took possession of the property after signing the lease. The Rileys never demanded access to the property. *Id.* at 115.

5. Section 7: Keep all of the fixtures, equipment and machinery in good repair during the entire term of the lease. The Rileys did nothing to meet the requirements of this provision. Mr. Riley testified that he did not maintain anything on the property since 2002. *Id.* at p. 114.

6. Section 11: Maintain liability insurance for any damages to persons or property in the amount of $500,000 for personal injury or property per occurrence and $1,000,000 in the aggregate. Mr. Riley testified that he did not provide any liability insurance on the premises from October 25, 2002 to the present. *Id.* at p. 114.

7. Section 13: Insure all of the buildings, equipment and fixtures on the property against loss from fire, lightning and other insurable hazards. Mr. Riley testified that he did not provide this insurance on the property. *Id.*

By his own admissions, the Rileys were in default of eight of the lease sections at the time they attempted to exercise the option to purchase. The Lease Option Agreement would only require the Rileys to be in breach of one of the sections to void the option.

On December 21, 2007, after receiving the Rileys' attempt to exercise the purchase option, Spiral Butte informed the Rileys that they were in default of the Lease Option Agreement and to respond within 10 days with their intentions. R. pp. 141-142. After receiving this letter stating the Lease Option Agreement was in default, the Rileys did nothing to remedy the defaults.

5. ATTORNEY FEES ON APPEAL

The Rileys did not request attorney fees on appeal, and therefore are not entitled to any such request now or award in the future.

Respondent requests attorney fees and costs on appeal pursuant to I.C. §§ 12-120. 12-121, I.R.C.P. 54 and Idaho Appellate Rules 40 and 41.

The Respondent submits that there is obviously no issue of fact herein. The claims of the Appellants are barred by their agreement with the Respondent. Their claim is based on a lease to a third party that does not include all the requirements of the Lease Option Agreement. They claim they are entitled to exercise the option to purchase when the Lease Option Agreement specifically states that they cannot exercise the option when they are in default of any term of the Lease Option Agreement. The appellant admits he has never complied with the contract terms,

and rightfully does not claim that Jensens fulfilled any of those for him. The appeal is frivolous, and should justify an award of fees and costs.

This appeal filed by the Rileys was nothing more than asking this Court to revisit and second guess the findings of the District Court. The same arguments and briefing that were presented to the District Court is what the Rileys chose to present here. There is no case law argued that directly applies to this case that was not addressed by the District Court. There is no additional argument that changes the outcome. There were no citations to the record that the District Court overlooked to grant the Rileys the relief they now seek. This matter clearly falls under a commercial transaction for the sale of property which would allow for the award of attorney fees. Finally, the Lease Option Agreement provides for attorney fees, and thus they should be awarded.

As such, attorney fees and costs should be awarded to Respondent in an amount provided after the conclusion of this matter.

CONCLUSION

The Rileys took no action to perform a single term of the Lease Option Agreement for 5 years. The Rileys were aware that after they failed to take possession and failed to take any action to attempt to comply with the lease, that Horkley leased the property to the Jensens. The Rileys made no inquiry into the terms of the lease between Horkley and Jensens, and had no idea as to what the terms of that lease were. At the end of the 5 year period, the Rileys sent a letter of intent to exercise the option and set a closing date at Alliance Title Company in Rexburg Idaho. The Rileys did not appear on the closing date, and did not tender any money whatsoever on or before the closing date. The Rileys to this date have never tendered any funds, nor cured any of the defaults.

This appeal is a frivolous appeal, as the facts and law applicable are extremely obvious and clear. There is no material fact at issue, nor is there any issue of law before this Court.

As argued above, there is no factual or legal basis for the Rileys' appeal. There is no genuine issue of fact, and Summary judgment was appropriately granted by the District Court and should be affirmed on appeal. Attorney fees and costs should be awarded in this matter.

Respectfully submitted this 7th day of January, 2013.

Larren K. Covert, Esq.
Of Swafford Law Office, P.C.
Attorney for the Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this day I caused to be served a true and correct copy of the foregoing document on the parties designated below and by the method of delivery indicated:

Michael J. Whyte, Esq.
Thompson Stevens Law Offices
2635 Channing Way
Idaho Falls, ID 83404

☒ MAILING
□ FAXING
□ HAND DELIVERY
□ COURTHOUSE BOX

Dated this 7th day of January, 2013

LARREN K. COVERT, ESQ.
Of Swafford Law Office, P.C.